LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U. S.
FILED
OCT 1 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 361

ARMAND EDWARD BLACKMAR,

Petitioner,

versus

L. F. GUERRE, Manager, Veterans Administration Regional Office No. 3021, New Orleans, Louisiana, and UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RENE' R. NICAUD and
CONRAD MEYER III,
Attorneys for Petitioner.

HAUSER PRINTING CO., INC., NEW ORLEANS

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statement	2
Specification of Errors to be Urged	5
Reasons for Granting the Writ	6
Conclusion	18

CITATIONS

Cases:

Adler v. Northern Hotel Co., et al, 175 F. 2d 619	9
Dismuke v. U. S., 297 U.S. 167, 56 S. Ct. 400	17
Ex parte State of New York, 256 U.S. 490, 41 S. Ct. 588	14
F. H. A. v. Burr, 309 U.S. 242, 60 S. Ct. 488	15
Gadsden v. U. S., 78 F. Supp. 126	14
Garlin v. Currie, 185 F. 2d 401	9, 15
Green v. Oberfell, 123 F. 2d 46, 138 A.L.R. 258, Cert. Den. 314 U.S. 637, 62 S. Ct. 72	17
Hoeness v. The United States, 335 U.S. 297, 69 S. Ct. 70	6, 13
Keifer and Keifer v. R. F. C., 306 U.S. 381, 59 S. Ct. 516	15
Krug v. Fox, 161 F. 2d 1013	13
Lamb v. U. S., 90 F. Supp. 369	14
Land v. Dollar, 330 U.S. 731, 67 S. Ct. 1009	14
Merchant Heat & Light Company v. J. B. Clow & Sons, 204 U.S. 286, 27 S. Ct. 285	16
Mine Safety Co. v. Forrestal, 326 U.S. 371, 66 S. Ct. 219	14
Minnesota v. Hitchcock, 185 U.S. 373, 22 S. Ct. 650	16
Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 67 S. Ct. 544	7

CITATIONS—(Continued)

Cases: Page

R. F. C. v. J. G. Menihan Corp., 312 U.S. 81, 61 S. Ct. 485 15
Robertson v. Railroad Labor Board, 268 U.S. 619, 45 S. Ct. 621 12
Seven Oaks, Inc. v. Federal Housing Administration, et al, 171 F. 2d 947 ..... 6, 11
State of Ohio v. United States Civil Service Commission, 65 F. Supp. 776 7
Stewart v. Hickman, 36 F. Supp. 861 9
Stewart v. United States Civil Service Commission, 45 F. Supp. 697 7
Stevens v. Walker, 61 F. Supp. 441 17
Stringer v. U. S., 90 F. Supp. 375 14
Tobin v. Hercules Power Co., 63 F. Supp. 434, 435 9
United States v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357 9
United States v. Yellow Cab Co., 71 S. Ct. 399 15
Universal Camera Corp. v. National Labor Relations Board, 71 S. Ct. 456 9
Wages v. United States Civil Service Commission, 170 F. 2d 182 7
Wittner v. U. S., 76 F. Supp. 110 ..... 14, 17
Wong Yang Sung v. McGrath, 339 U.S. 33, 70 S. Ct. 445 9

Statutes:

Administrative Procedure Act, Title 5, United States Code Annotated, Sections
1009 (b) 6, 8, 10
Fair Labor Standard Act, Title 29, United States Code Annotated, Section
216 (b) 9
Federal Rules of Civil Procedure,
Rule 4 (d) (4) and (5) 4, 11, 12, 17
Rule 54 (c) 16

CITATIONS—(Continued)

Statutes: Page

Title 5, United States Code Annotated, Section 118 k (c) 7, 10
Title 5, United States Code Annotated, Section 632 7
Title 5, United States Code Annotated, Section 652 (b) (2) 14
Title 28, United States Code Annotated, Section 1254 (1) 2
Title 28, United States Code Annotated, Section 1346 15
Title 28, United States Code Annotated, Section 1391 (b) 5, 10
Title 28, United States Code Annotated, Section 1402 ..... 13, 15
Title 28, United States Code Annotated, Section 1404 (a) 5
Title 28, United States Code Annotated, Section 1406 (a) 5, 17
Veterans Preference Act, Title 5, United States Code Annotated, Sections
866 ..... 7, 8
863 ..... 14, 17

Miscellaneous:

54 American Jurisprudence, Sec. 105 15
Code of Federal Regulations, 1947 Sup., Title 5, Chap. 1, Sections 22.6-22.10 7
Encyclopedia of Federal Procedure, Vol. V, Sec. 1555, pg. 137 16

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. _____

ARMAND EDWARD BLACKMAR,

Petitioner,

versus

L. F. GUERRE, Manager, Veterans Administration Regional Office No. 3021, New Orleans, Louisiana, and UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Armand Edward Blackmar, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, issued on July 11, 1951 (R. 38) which affirms the decree of the District Court for the Eastern District of Louisi-

ana, New Orleans Division, dismissing petitioner's complaint on the ground of improper venue.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears in the transcript of record herein, pages 38 to 41. It has not yet been published in the reporters.

JURISDICTION

The decree of the Court of Appeals was entered on July 11, 1951, and the jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The question presented is whether the Eastern District of Louisiana is the proper venue for this action and if it is not the proper venue, whether the District Court should not have transferred the action to the proper district instead of dismissing it.

STATEMENT

This is an action brought by a World War veteran to review the administrative proceedings which effected his discharge from his Civil Service position with the Veterans Administration at New Orleans and for a declaratory judgment of his rights under the Veterans Preference Act. The complaint shows that petitioner, a resident of New Orleans, Louisiana, was discharged by the defendant, Guerre, New Orleans Regional Manager of the Veterans Administration. From this action he appealed under Section 14 of the Veterans Preference Act to the Civil Service Commission. After a hearing before the Commission's Regional Board in New Orleans,

it unanimously held that petitioner's dismissal had been illegal and ordered his reinstatement. From this order the Regional Manager of the Veterans Administration appealed to the Board of Appeals and Review of the Civil Service Commission and a further hearing was conducted by that board in Washington, D. C. Under the impression from the advice of the Commission, that the Board of Appeals and Review had decided the case adversely to him, petitioner requested a hearing before the Commission and that he be furnished with the recommendations and findings of the Board of Appeals and Review and the Commission's approval thereof. His request for the recommendations and findings of the Board of Appeals and Review was refused, but he was granted a further hearing before the Commission and the matter was submitted to it on briefs. The Commission then advised him that it had approved its previous decision reversing the findings of the Tenth Regional Civil Service Board and approving the action of the Veterans Administration in removing him from his position. No findings in support of any decisions other than the Regional Decision in his favor were ever furnished him. All of these facts are averred in petitioner's complaint (R. 6-16).

Having exhausted his administrative remedies petitioner filed his complaint in the United States District Court in New Orleans where he resides and the controversy arose. He named as defendants, the Civil Service Commission and the Regional Manager of the Veterans Administration, who also resides in New Orleans. His complaint alleges that the action of the Regional Manager of the Veterans Administration and the Washington proceedings of the Civil Service Commission are illegal and void because they violate the mandatory provisions

of Section 14 of the Veterans Preference Act in that *inter alia*, he was not notified in writing specifically and in detail of the reasons for his discharge and not furnished with findings for the adverse decision of the Civil Service Commission. He prays for a declaratory judgment of his rights under the Veterans Preference Act and ultimately seeks reinstatement to his position and the restoration of his lost pay.

The defendant, L. F. Guerre, Regional Manager of the Veterans Administration at New Orleans, was served and the Civil Service Commission was served through its Regional Director in New Orleans. In accordance with Rule 4 (d) (4) and (5) of the Rules of Civil Procedure, the United States was served through the United States Attorney in New Orleans and a copy of the complaint was served by registered mail on the Attorney General and the Civil Service Commission in Washington, D. C. (R. 2 and 3).

The government moved to dismiss the complaint on the ground of lack of venue and jurisdiction, which motion was dismissed. (R. 3) It then filed its answer (R. 17) and pursuant to the motion of petitioner's counsel filed the record of the Administrative Proceedings in Court (R. 3). Petitioner then filed a motion for summary judgment and the government in turn filed a counter motion for summary judgment and reurged its exception to venue and jurisdiction. The exception to venue was then sustained by the District Court and the action dismissed (R. 4). This decree was affirmed by the Fifth Circuit Court of Appeals which held that the legal residence of the Civil Service Commission was the District of Columbia and that a suit could only be brought against the Commission in the District Court of

the District of Columbia because of the general venue provision of 28 U.S.C.A. 1391 (b). The Court of Appeals further held that the suit could not be transferred to the District of Columbia pursuant to 28 U.S.C.A. 1404 (a) or 1406 (a) because that would be an improper venue for the defendant, L. F. Guerre, a resident of the State of Louisiana. The other questions raised by petitioner were not mentioned by the Court in its decision.

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

1. In holding that the United States Civil Service Commission could not be sued in the Eastern District of Louisiana on this cause of action.

2. In failing to recognize and hold that this suit is essentially an action against the United States Government and as such maintainable in the District Court of the Eastern District of Louisiana where the petitioner resides.

3. In failing to recognize that the Civil Service Commission waived its objection to venue by filing the record of the Administrative Proceedings in the District Court of the Eastern District of Louisiana and affirmatively seeking a summary judgment, which was the same remedy sought by the petitioner.

4. If the United States Civil Service Commission was not property subjected to the jurisdiction of the District Court for the Eastern District of Louisiana, the court erred in not sustaining petitioner's alternative contention that it was not an indispensable party to this action.

5. In the alternative, in the event the District

Court was correct in its ruling that it did not have venue in this case, the Court nevertheless erred in dismissing petitioner's complaint, since venue was not a ground for dismissal of the action, and it should instead have transferred it to the proper district.

REASONS FOR GRANTING THE WRIT

1. The holding of the Court of Appeals for the Fifth Circuit that the Civil Service Comission can only be sued in Washington, D. C., in actions of this type conflicts with the holding of the Court of Appeals for the Fourth Circuit in the case of *Seven Oaks, Inc. v. Federal Housing Administration, et al*, 171 F. 2d 947, and is contrary to and ignores the specific venue provision of the Administrative Procedure Act as set forth in Section 10 (b) thereof, 5 U.S.C.A. 1009 (b), which provision has never been interpreted by this Court. The holding of the Circuit Court of Appeals is also not in accord with the decision of this Court in the case of *Hoeness v. The United States*, 335 U.S. 297, 69 S. Ct. 70.

The application of the concept of residence to a Board or Commission of the United States Government such as the Civil Service Commission is a judicial creation for there is no statutory provision to that effect. This theory fails to recognize that these Commissions are separate entities from the individuals who compose them and are in fact ubiquitous being present as agencies of the United States Government throughout the land and in New Orleans, Louisiana, as well as in Washington, D. C.

The proper rule is that applicable to suits against the United States as recognized by this Court in the case of *Hoeness v. The United States, supra*, in which it said (69 S. Ct. pg. 73):

> • • • "The concepts of residence and principal place of business obviously can have no relevance when applied to the United States. It is ubiquitous throughout the land, and unlike private parties, is not centered at one particular place." • • •

The Circuit Court of Appeals decision recognizes that the Civil Service Commission is an entity separate from its members and suable as such. It is so sued in this case. Unlike some other government agencies there is no provision of the law stating that its principal office or place of business shall be the District of Columbia. In fact the provisions of laws on the Civil Service Commission show that it, like the United States, is not to be considered centered in one particular place. Section 17, Veterans Preference Act, 5 U.S.C.A. 866, also 5 U.S.C.A. 632; Political Activities Act, 5 U.S.C.A. 118 k (c) and the decisions under the latter act, particularly *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 67 S. Ct. 544; *Wages v. United States Civil Service Commission*, 170 F. 2d 182 (C.C.A. 6th Circ.); *Stewart v. United States Civil Service Commission*, 45 F. Supp. 697; *State of Ohio v. United States Civil Service Commission*, 65 F. Supp. 776.

The Commission has a substantial staff in New Orleans. It has a Regional Director there, who, with two other members, pass upon the Regional appeals and perform numerous specific duties and possess important powers of the Commission concerning matters covered by the Veterans Preference Act including the conducting of investigations, hearings and the making of decisions on the appeals under this act (Code of Fed. Reg. 1947 Sup. Chap. 1, Secs. 22.6-22.10). The Regional Director is also in practice the general manager of the Commission in this

district, in which there are thousands of federal employees. From the foregoing it would seem clear that the Regional Director is included within the term "Civil Service Commission" as expressly defined by Sec. 17 of the Veterans Preference Act, 5 U.S.C.A. 866. It is reasonable, therefore, to say that the Civil Service Commission is present and functioning and carrying on its business in that jurisdiction and that the service upon the Regional Director in New Orleans was effective service upon the Commission.

The Administrative Procedure Act was enacted to provide adequate judicial review of administrative proceedings and not only did the sovereign thereby consent to such suits, but this statute specifically provides the venue in which such actions may be brought.

5 U.S.C.A., Sec. 1009 "Judicial Review of Agency Action * * * "Form and **venue of proceedings**"

> "(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or *habeas corpus*) **in any court of competent jurisdiction.** * * * " (Emphasis ours)

The express and obvious purpose of the provision just quoted is to state what shall be the proper place or venue of actions to review administrative proceedings.

The cumulative meaning of the provisions of the Administrative Procedure Act is that any authority of the United States Government (other than Congress, etc.) may be sued for a judicial review of its proceedings

"in any court of competent jurisdiction"; that the venue of these proceedings is "any court of competent jurisdiction". Since the District Courts of the United States are courts of general competent jurisdiction, this provision means that such an action may be brought in any United States District Court.

The phrase "any court of competent jurisdiction" is very broad and similar provisions in other federal statutes have been broadly construed. Thus the identical phrase "any court of competent jurisdiction" in the Fair Labor Standards Act (29 U.S.C.A. 216 (b)) has been held to mean any court of general jurisdiction whether Federal, State or Territorial. *Stewart v. Hickman*, 36 F. Supp. 861, and in *Tobin v. Hercules Power Co.*, 63 F. Supp. 434, 435, construing the same phrase the court said appropriately that it:

> "shows the congressional intent to afford employees the obvious advantage of settling small claims in local tribunals."

The Circuit Court of Appeals for the Fifth Circuit has itself held that similar words conferred jurisdiction to the Federal District Courts over rent overcharge cases even where the amount involved is less than $3,000.00. *Garlin v. Currie*, 185 F. 2d 401, following *Adler v. Northern Hotel Co., et al*, 175 F. 2d 619. (7th Circ.). This is also in accord with the decisions of this Court which show that the Administrative Procedure Act is to be liberally construed so as to effectuate its purpose of providing adequate safeguards and remedies against the encroachments of arbitrary administrative actions. *United States v. Morton Salt Co.*, 338 U.S. 632, 70 S. Ct. 357; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S. Ct. 445, and *Universal Camera Corp. v. National Labor Relations Board*, 71 S. Ct. 456.

The judicial review provision of the Political Activities Act, 5 U.S.C.A. 118 k (c) is a law in *pari materia* with the Administrative Procedure Act insofar as the latter applies to the Civil Service Commission. This section of the Political Activities Act provides for the filing of the petition for review "in the district court of the United States for the district in which such officer or employee resides" and that a copy thereof "shall forthwith be served upon the Commission." It was enacted prior to the Administrative Procedure Act and may appear to be more specific in respect to venue. However, it dealt in this respect with only one governmental agency whereas the Administrative Procedure Act dealt with all, hence the broader provisions of the latter; but to give effect to the provisions of the Political Activities Act with reference to service it is obvious that Congress considered the Commission present and subject to service in the District of the plaintiff's residence.

It appears from the foregoing that the United States Civil Service Commission is to be considered present and suable in New Orleans as well as the District of Columbia and that on the question of venue (i.e., the place where the action may be brought) for the review of the Administrative Proceedings, the controlling provision is not the general venue statute 28 U.S.C.A. 1391 (b), but the particular and express provision of Section 10 (b) 5 U.S.C.A. 1009 (b) of the Administrative Procedure Act which clearly does permit the action to be brought in the District Court for the Eastern District of Louisiana since it is a court of competent jurisdiction. This resolves the question to one of service only, namely, whether the service effected on the Civil Service Commission through its Regional Manager in New Orleans was proper service on the Commission. This must

be determined not by the venue statute, but by the law pertaining to service which is Rule 4 (d) (4) and (5) of the Federal Rules of Civil Procedure. Service was made on the United States in specifically the manner required by Rule 4 (d) (4) and (5). Rule 4 (d) (5) provides:

> "Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule."

This leaves only the question whether the delivery of the copy of the summons and complaint on the Civil Service Commission by physical delivery to its Regional Manager in New Orleans was substantial compliance with the above requirement of delivery thereof to the agency. The only reasonable conclusion is that if the Civil Service Commission is suable in New Orleans at all, the normal and proper person upon whom to make such delivery is the Regional Director, its chief representative in the district. This is precisely what was done in the present case. Furthermore, if the Civil Service Commission is an entity separate from its members, as apparently recognized by the Court of Appeals, it is in the nature of, or analagous to, a government corporation, and the reference *supra*, to Section 4 (d) (3) of the rule supports the conclusion that delivery to its Regional Manager constituted delivery to the Commission.

The Case of *Seven Oaks, Inc. v. Federal Housing Administration, supra* is directly in point with this one. In that case it was held that the Federal Housing Administration could be sued in the District Court of the

Eastern District of Virginia and service made through its Regional Director there, where the plaintiff resided and the cause of action arose; that such district was the proper venue of the case. In overruling the government's contention that the Federal Housing Administration could be sued only in the District of Columbia, the court said (171 F. 2d page 948):

> "The statute giving consent to suit is more than a mere waiver of immunity. It provides not only that the agency may be sued, but also in what courts suit may be instituted. The exact language of the statute is: 'the Administrator shall, in carrying out the provisions of this title and titles II and III, be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal'. 49 Stat. 722, 12 U.S.C.A. Sec. 1702. There is no more ambiguity in the language used and no more reason to restrict its meaning than there was the meaning of the language permitting suit 'in any United States District Court' in the Railway Labor Act, 45 U.S.C.A. Sec. 151, et seq. See *Robertson v. Railroad Labor Board*, 268 U.S. 619, 623, 624, 45 S. Ct. 621, 623, 69 L. Ed. 119. It is necessary as pointed out in that case, that the court in which suit is brought be able to acquire jurisdiction over the defendant by service of process but where the Housing Administration is doing business within a district and has present an agent in charge of its affairs, there is no reason why service of process cannot be made upon it, and upon the United States, whose representative it is, in accordance with the provisions Rule 4 (d) (4) and (5), Federal Rules of Civil Procedure, 28 U.S.C.A. * * * "
>
> " * * * Provision is made that suits against the United States shall be brought in the district of plaintiff's residence, or, in the case of tort claims, where the act or omission complained of

> occurred. 28 U.S.C.A. section 1402. Suits against officials of the government in their official capacity are suits against the United States. *Krug v. Fox*, 4 Circ., 161, F. 2d 1013, 1018-1020, and cases there cited. There would be no sense in requiring a suit such as this, which is a suit against an official in his official capacity with respect to business transactions of a government agency, to be brought in the District of Columbia, while allowing other suits against the government, where there is less reason to consult the convenience of plaintiffs, to be brought by them in the districts of their residence."

Nor can the above case be distinguished from the present one. The operation of the Civil Service Commission is just as much the business of the Government as is the operation of the Federal Housing Administration. The underlying reason is precisely the same, and that is, that where the government or a corporation transacts its functions in a jurisdiction on a substantial basis through permanent agents of important authority it is unfair and unreasonable that it should not be subject to suit in such jurisdiction by a resident thereof on a matter originating therein.

If the Supreme Court held as it did in *Hoeness vs. United States, supra*, that the United States is ubiquitous, and concepts of residence should not be applied to it, how can the Courts logically limit the venue of the Civil Service Commission to Washington, D. C., in view of its statutory definition, its representations and operations in New Orleans as an agency of the United States Government and the broad provisions of the Administrative Procedure Act with reference to venue? It is submitted that a decree against the Civil Service Commission in this matter by the District Court for the

Eastern District of Louisiana, would be *res adjudicata* against the Commission and binding upon it in the District of Columbia as well as in New Orleans.

2. If the essential nature and effect of the proceedings are such as to make it plain that the judgment sought would expend itself on the public treasury or domain, then the action against an officer or agency of the United States is to be considered essentially an action against the United States itself. *Mine Safety Co. v. Forrestal*, 326 U.S. 371, 66 S. Ct. 219; *Land v. Dollar*, 330 U.S. 731, 67 S. Ct. 1009; *Ex parte State of New York*, 256 U.S. 490, 41 S. Ct. 588, 65 L. Ed. 1057. It is evident from a reading of the complaint that the remedy sought in this case will expend itself on the United States Government. If the actions of the Regional Manager of the Veterans Administration and the Civil Service Commission complained of by petitioner are annulled, then he is entitled to be restored to his position with the United States Government and it is the one who will have to reimburse him the pay which he lost; and there is no question but that the sovereign has consented to such suits. 5 U.S.C.A. 652 (b) (2); 5 U.S.C.A. 863; *Wittner v. U. S.*, 76 F. Supp. 110; *Gadsden v. U. S.*, 78 F. Supp. 126; *Lamb v. U. S.*, 90 F. Supp. 369; *Stringer v. U. S.* 90 F. Supp. 375.

In failing to recognize that this was in fact a suit against the United States Government, the decision of the Circuit Court of Appeals conflicts with the Supreme Court decision of *Mine Safety Co. v. Forrestal, etc., supra.*

The complaint avers that the amount involved exceeds $3,000.00 and that petitioner's salary with the

Veterans Administration was $5,152.80 per annum and that he was suspended without pay January 2, 1947 and discharged March 2, 1947 (R. 6 and 7). All of these averments are admitted by the government's answer. (R. 17 and 18). The complaint was filed on March 1, 1948, and the rule is that the amount for the purpose of jurisdiction must be determined as of the date suit is filed. 54 Amer. Juris. Sec. 105. Thus it is apparent from the face of the pleadings that as of the date this suit was filed, the monetary amount involved was not more than one year's salary or $5,152.80 which was considerably less and could not have been in excess of the $10,000.00 District Court jurisdictional limitation for suits against the United States, 28 U.S.C.A. 1346, and the proper venue for such actions against the United States is the district of the plaintiff's residence which in this case is the Eastern District of Louisiana. 28 U.S.C.A. 1402.

Furthermore by virtue of the sweeping waiver of governmental immunity effected by the Administrative Procedure Act as to suits for the review of administrative proceedings it appears that the District Court would have jurisdiction of the matter regardless of the amount involved. This is in keeping with the decisions of this Court holding that waiver of governmental immunity must be liberally construed. *United States v. Yellow Cab Co.*, 71 S. Ct. 399; *Keifer and Keifer v. R. F. C.*, 306 U.S. 381, 59 S. Ct. 516, 83 L. Ed. 748; *F. H. A. v. Burr*, 309 U.S. 242, 60 S. Ct. 488, 84 L. Ed. 724; *R. F. C. v. J. G. Menihan Corp.*, 312 U.S. 81, 61 S. Ct. 485, 85 L. Ed. 595, and consistent with the decision of the Fifth Circuit Court of Appeals in the case of *Garlin v. Currie, supra.*

The United States government was duly served in these proceedings and in view of the foregoing, the District Court should have granted leave to petitioner to amend his complaint so as to name the United States as a party defendant *"eo nomine"*. However, whether it is so specifically named or not it is now well settled that if an action is brought against an agent of the government and the real party in interest is the United States, the Court will consider it as a suit against the United States and render judgment accordingly. *Minnesota v. Hitchcock*, 185 U.S. 373; 22 S. Ct. 650.

Nor is it material that the prayer of the complaint does not specifically ask for a monetary judgment against the United States. A plaintiff is entitled to whatever judgment the facts alleged in his petition justify, irrespective of the provisions of the prayer of his complaint. Rule 54 (c), Federal Rules of Civil Procedure.

3. The Civil Service Commission brought into New Orleans and filed in the District Court there its administrative record of the proceedings. If its position on venue or personal jurisdiction was correct, the District Court was powerless to compel the Commission to bring the record into New Orleans and file the same as it did in the District Court. It appears clear that by this conduct it waived its objection to venue or personal jurisdiction. Any doubt on that score would seem to be eliminated when it went further and affirmatively asked for a summary judgment on the face of that record (R. 4) which was the same relief sought by the plaintiff. Lack of jurisdiction of the person is waived by seeking relief similar to that requested by the other party. *Encyclopedia of Federal Procedure*, Vol. V, Sec. 1555, pg. 137; *Merchant Heat & Light Company v. J. B.*

Clow & Sons, 204 U.S. 286; 27 S. Ct. 285; *Green v. Oberfell*, 123 F. 2d 46, 138 A.L.R. 258, Cert. Den. 314 U.S. 637, 86 L. Ed. 511, 62 S. Ct. 72; *Stevens v. Walker*, 61 F. Supp. 441.

4. In the alternative, petitioner contends that if the Civil Service Commission has not been property subjected to suit in the Eastern District of Louisiana, it is not an indispensable party to this action. If any remedy could be afforded petitioner by the District Court, it should not have dismissed this action. It could surely have rendered judgment against the United States Government for the monetary amount determined to be due him without the Civil Service Commission being a party to the action. The mere fact that the validity of an order of an agency such as the Civil Service Commission is being attacked does not make that agency an indispensable party to the suit. Rule 4 (d) (4) Federal Rules of Civil Procedure; *Dismuke v. U. S.*, 297 U.S. 167; 56 S. Ct. 400; *Wittner v. U. S., etc., supra.* Nor is any affirmative action required of the Commission for petitioner's reinstatement for as to it, all the court need do is to adjudge the nullity of its Washington decision reversing its Regional Decision, and to recognize the latter decision (which held the dismissal illegal and ordered petitioner's reinstatement) to be the lawful and mandatory order of the Commission, 5 U.S.C.A. 863.

5. In the event the District Court was correct in its ruling that it did not have venue in this case, the court nevertheless erred in dismissing petitioner's complaint, since venue was not a ground for dismissal of the action, and it should instead have transferred it to the proper district. At the time the Government filed its motion to dismiss for want of venue, Section 1406 (a) of Title 28, U.S.C.A., read as follows:

> "The District Court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division in which it could have been brought."

It is submitted that the Government's motion must be considered on the basis of what the law was at the time its objection was filed and on that basis it was mandatory for the District Judge to transfer and not dismiss the suit if his position was otherwise correct.

The fact that the defendant, Guerre, is a resident of New Orleans does not prevent the transfer of the case, for it could still have been brought in the District of Columbia. It would be optional with the defendant, Guerre, if he wished to urge the objection of venue. If he did urge this objection, it would not defeat the jurisdiction of the Court of the District of Columbia to hear the case *quoad* the United States Civil Service Commission, which under the Government's theory is the only indispensable party.

CONCLUSION

It is important to Veterans and to citizens to know whether suits for the review of administrative proceedings, can be brought only in the District of Columbia where in most cases, because of its distance from the plaintiffs' residence, they cannot in fact litigate, or whether the Administrative Procedure Act does afford them effective redress against the abuses of administrative agencies by permitting the bringing of such actions in a convenient and practical forum, such as the district court of the plaintiffs' residence. The decision below conflicts in fundamental principal with that of decisions of this Court and another Court of Appeals and the

specific question involved has never been settled by any decision of this Court. The question is of substantial public importance. It is respectfully submitted that this petition for a Writ of Certiorari should be granted.

ARMAND EDWARD BLACKMAR

By

RENE' R. NICAUD and
CONRAD MEYER III,
Attorneys for Petitioner.